(1) Supreme Court, U.S.
FILED

No. 03-031105 JAN 29 2004

IN THE

Supreme Court of the United States

IN RE ROBERT E. BROWN, M.D. AND DOROTHY L. BROWN, DEBTORS; ROBERT E. BROWN M.D. AND DOROTHY L. BROWN,

Petitioners,

v.

WALLACE E. TURNER AND JOANN M. TURNER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT D. KODAK
KNUPP, KODAK & IMBLUM, P.C.
Attorneys for Petitioners
407 North Front Street
P.O. Box 11848
Harrisburg, PA 17108-1848
(717) 238-7151

185368

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. WHILE PASSING ON THE EXISTENCE OF AN "INFORMAL PROOF OF CLAIM" AS THAT PHRASE IS USED IN BANKRUPTCY JURISPRUDENCE, DID THE COURT OF APPEALS IN THIS CASE MANAGE TO CREATE A CONFLICT AMONG THE CIRCUITS ON MULTIPLE POINTS OF LAW WITH RESPECT TO THAT DOCTRINE?

2. APART FROM THE CONFLICTS AMONG THE CIRCUITS THAT THE COURT OF APPEALS' DECISION IN THE PRESENT CASE CREATED, DO OTHER CONFLICTS AMONG THE CIRCUITS IN THIS AREA OF LAW REQUIRE RESOLUTION BY THIS COURT?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iv

Table of Appendices vi

Opinions Below 1

Statement of Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Petition 6

Argument I

While Passing On The Existence Of An "Informal Proof Of Claim" As That Phrase Is Used In Bankruptcy Jurisprudence, The Court Of Appeals In This Case Managed To Create A Conflict Among The Circuits On Multiple Points Of Law With Respect To That Doctrine. 6

Contents

Page

Argument II

Apart From The Conflicts Among The Circuits That The Court Of Appeals' Decision In The Present Case Created, Other Conflicts Among The Circuits In This Area Of Law Do Require Resolution By This Court. 11

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

CASES

In Re Anderson-Walker Industries, Inc., 798 F.2d 1285 (9th Cir. 1986) 12, 13

In Re The Charter Company, 876 F.2d 861 (11th Cir. 1989) 8

In Re Haugen Construction Services, Inc., 876 F.2d 681 (8th Cir. 1989) 8, 12

In Re Holm, 931 F.2d 620 (9th Cir. 1991) 8

In Re International Horizons, Inc., 751 F.2d 1213 (11th Cir. 1985) 8, 9, 10, 12

Liakas v. Creditors Committee of Deja Vu, Inc., 780 F.2d 176 (1st Cir. 1986) 8

In Re McCoy Management Services, Inc., 44 BR 215 (W.D. Ky. 1984) 7

In Re Michaels, 286 BR 684 (8th Cir., Bankruptcy Appeal Panel 2002) 8, 12

In Re M. J. Waterman and Associates, Inc., 227 F.3d 604 (6th Cir. 2000) 8, 12

In the Matter of Nikoloutsos, 199 F.3d 233 (6th Cir. 2000) 8

Cited Authorities

	Page
Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985)	6, 7
Pioneer Investment Services, Co. v. Brunswick Associates Limited Partnership, 503 U.S. 380, 113 S. Ct. 1389 (1993)	13, 14
In the Matter of Pizza of Hawaii, Inc., 761 F.2d 374 (9th Cir. 1985)	8
In Re Reliance Equity Inc., 966 F.2d 1338 (10th Cir. 1992)	8, 9, 10
In Re Sambo's Restaurant, Inc., 754 F.2d 811 (9th Cir. 1985)	8
In Re South Atlantic Financial Corp., 767 F.2d 814 (5th Cir. 1985)	8
Statutes:	
11 U.S.C. § 1111	2, 11, 13
28 U.S.C. § 1254(1)	1

TABLE OF APPENDICES

Page

Appendix A — Judgment And Bench Opinion Of The United States Court Of Appeals For The Third Circuit Dated September 30, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Middle District Of Pennsylvania Dated October 10, 2002 ..... 7a

Appendix C — Memorandum And Order Of The United States Bankruptcy Court For The Middle District Of Pennsylvania Dated June 25, 2001 .. 11a

Appendix D — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Panel Rehearing Dated November 3, 2003 .. 22a

Appendix E — Statute Involved 24a

Robert E. Brown, M.D. and Dorothy L. Brown respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *In re Robert E. Brown, M.D.; Dorothy L. Brown, Debtors v. Wallace E. Turner; Joann M. Turner*, No. 02-4137 (Petition for Reargument denied by Order dated November 3, 2003).

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania has not been officially reported. The Opinion and Order filed October 10, 2002 in Civil Action 4:01-CV-01459 appears as Appendix A hereto. The opinion of the United States Court of Appeals for the Third Circuit is also unreported. The panel opinion of September 30, 2003 in Case No. 02-4137 appears as Appendix B hereto. The Court of Appeals' Order denying reargument in its Case No. 02-4137, dated November 3, 2003, appears as Appendix C hereto. The Bankruptcy Court's Order and Opinion, which is also unreported, appears here as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 2003. The Court of Appeals denied a timely petition for reargument by its Order dated November 3, 2003. This Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved in this Petition, at least indirectly, is Section 1111 of the Bankruptcy Code, 11 U.S.C. § 1111. That statute appears as Appendix E hereto.

STATEMENT OF THE CASE

On June 14, 1995, the Petitioners ("the Browns") sought bankruptcy protection under Chapter 11 of the Bankruptcy Code, Title 11, United States Code. The Browns were forced to file bankruptcy essentially because of one disputed debt, a debt that they allegedly owe to Wallace and Joanne Turner ("the Turners"), the Respondents herein.

In Illinois, the Browns and Turners had sued one another. The Browns were seeking return of a $5,000.00 deposit they had made on their anticipated purchase of the Turners' house. For various reasons, the Browns' purchase of the property in question was aborted. Paramount in these events was the failure of the State of Illinois to accord Dr. Brown a license to practice medicine in that state by a specified date. The Turners were lying in wait, because they sued the Browns almost immediately afterward. The Illinois Court then consolidated the two cases.

In their suit against the Browns, the Turners (at least theoretically) were seeking "specific performance" *from the buyers, the Browns*, of the contract to purchase the home. After trial in 1993, the Illinois trial court awarded the Turners damages in the amount of $2,224.18. The Turners appealed that decision.

The Illinois Court of Appeals reversed the trial court decision, and remanded the case for a calculation of "equitable damages" in connection with instructions to enter an order for specific performance against the Browns. The Browns filed for bankruptcy prior to the trial court acting on the remand.

On August 8, 1995, the Turners moved for relief from the automatic stay in Bankruptcy Court, so that the Turners could pursue their "specific performance remedies" in the courts of Illinois. In that motion, and in their supporting brief, the Turners averred on numerous occasions that they did not have a "claim" as that term is used in the Bankruptcy Code.

In connection with the Turners' Motion for Relief from the Automatic Stay, the parties entered into a stipulation of facts, with exhibits. That stipulation was filed of record. The parties also submitted briefs to the Court. Again, in their brief in support of their motion for relief from the stay, the Turners repeatedly stated that they did not have a "claim" as that term is used in the Bankruptcy Code.

The Bankruptcy Court issued its decision on the Turners' Motion for Relief from the Automatic Stay on February 28, 1997. With that order and opinion, the Court found that the Turners were not entitled to relief from the automatic stay. More importantly, the Court found that the Turners did have a "claim" as that term is used in the Bankruptcy Code. Continuing from that finding, the Court went on to fashion a formula to determine the amount of the Turners' claim, dependent upon certain actions to be taken with the house, namely its sale. In its February 28, 1997 Order, the Court also required the Browns to pay to the Turners amounts in excess of the initial Illinois trial court judgment, depending

upon the amount for which the Turners' house sold. In response, the Turners filed a motion for equitable damages in which they sought recovery of every conceivable household expense, including cable television bills, from the spring of 1992 forward.

The Browns moved to strike the Turners' motion. The Browns also moved for reconsideration of the Bankruptcy Court's February 28, 1997 Order. With that motion pending, the Turners submitted what purported to be an "amended proof of claim," despite the fact that the Turners had repeatedly contended both in their Motion for Relief from Automatic Stay and in their brief in support thereof, that they did not have a "claim" as that word is used in the Bankruptcy Code. The Browns filed an objection to the Turners' "amended proof of claim."

By Order dated June 2, 1998, the Bankruptcy Court denied the Browns' motion for reconsideration. The Court ordered that the parties were to resolve the amount of the Turners' claim in accordance with the formula set forth in the Court's February 28, 1997 Order, or list the matter for trial. A large part of the Bankruptcy Court's rationale for the June 2, 1998 Order, is the Bankruptcy Court's finding that the Turners had submitted an "informal proof of claim" by virtue of their Motion for Relief from the Automatic Stay.

The parties appealed the February 28, 1997 and June 2, 1998 Orders through the district court and the Court of Appeals. The Court of Appeals held that the appeal was from an order that was not final. It therefore dismissed the appeal and remanded it to the Bankruptcy Court for further proceedings.

The Bankruptcy Court held a hearing after remand. The Bankruptcy Court ordered the Browns to pay the Turners $36,984.44 in satisfaction of the Turners' claim. That hearing was in the Summer of 2001.

The Browns appealed the Bankruptcy Court's Order. By Opinion and Order dated October 10, 2002 (subsequently amended in a manner not relevant to this petition by Order dated October 21, 2002), the United States District Court for the Middle District of Pennsylvania affirmed the Bankruptcy Court. The Browns then appealed that Order to the United States Court of Appeals for the Third Circuit.

At oral argument in August of 2003, the three judge panel of the Court of Appeals literally issued its opinion from the bench. The opinion was reduced to writing by Opinion and Order dated September 30, 2003. The Court of Appeals held that the Turners' motion for relief from stay constituted an "informal proof of claim," despite the fact that the Turners repeatedly stated in that document that they do not have any claim. Given this curious result, the Browns petitioned for reargument. The Court of Appeals denied reargument by its Order dated November 3, 2003.

REASONS FOR GRANTING THE PETITION

ARGUMENT I

WHILE PASSING ON THE EXISTENCE OF AN "INFORMAL PROOF OF CLAIM" AS THAT PHRASE IS USED IN BANKRUPTCY JURISPRUDENCE, THE COURT OF APPEALS IN THIS CASE MANAGED TO CREATE A CONFLICT AMONG THE CIRCUITS ON MULTIPLE POINTS OF LAW WITH RESPECT TO THAT DOCTRINE.

The Court of Appeals' decision in this case is truly unique. Initially, in the Bankruptcy Court, when the Turners contended that they did not have a claim, we argued that they did have a claim in that, no matter how they couched it, they were looking only for money. In making that argument, we relied on this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985). In that case, the State of Ohio had obtained an injunction requiring environmental clean up, and requiring that certain resources be devoted to that endeavor. The defendant in that state proceeding, Mr. Kovacs, ultimately sought bankruptcy protection. When the parties arrived in that forum, Mr. Kovacs argued that, although the State of Ohio had obtained injunctive relief, the state was, for purposes of the bankruptcy, looking only for monetary relief. Therefore, Mr. Kovacs argued, the State of Ohio had a "claim" as that word is used in bankruptcy jurisprudence, and that the State's claim was dischargeable. The Bankruptcy Court, the District Court and the United States Court of Appeals for the Sixth Circuit all agreed with that contention. This Court, after granting Ohio's Petition for a Writ of Certiorari, affirmed the lower courts.

Given the result in the present case, it appears that, here, too, all lower courts agreed with the Browns' initial contention in this regard, a contention that has never changed. Curiously, though, none of the lower courts cited *Kovacs* in any of their opinions.

In any event, with its decision in the present case, the Browns submit that the Third Circuit has created at least two conflicts among the circuits. One is a general type of conflict, and the second conflict revolves around a specific issue.

As of the date that this petition is being initially drafted, our research has disclosed that the various courts of appeal have rendered thirteen published decisions on the issue of informal proof of claim. These decisions have ranged in time from the mid 1980s through late 2002. The requirements for a creditor to file a valid informal proof of claim are similar throughout the United States, although there are some differences among the circuits which we will describe in the following sections.[1]

We recite the cases that the Courts of Appeal have decided to give this Court an illustration of the time period over which they have been decided, and to illustrate the

---

1. The requirements that the Court of Appeals articulated in the present case are: 1.) that the document purporting to be an informal proof of claim be in writing, 2.) that the writing contain a demand by the creditor on the debtor's estate, 3.) that the writing express an intent to hold the estate (not the debtor, as the Court of Appeals recited) liable for the debt; 4.) that the document be filed with the bankruptcy court and 5.) based on the particular case, it would be equitable to allow the amendment of the informal proof of claim. See Court of Appeals opinion at 2-3 (citing *In Re McCoy Management Services, Inc.*, 44 BR 215, 217-218 (W.D. Ky. 1984)).

number of circuits that have actually published such a decision prior to the opinion in the present case. The cases are as follows.

In Re International Horizons, Inc., 751 F.2d 1213 (11th Cir 1985); *In Re Sambo's Restaurant, Inc.*, 754 F.2d 811 (9th Cir. 1985); *In the Matter of Pizza of Hawaii, Inc.*, 761 F.2d 374 (9th Cir. 1985); *In Re South Atlantic Financial, Corp.*, 767 F.2d 814 (5th Cir. 1985); *Liakas v. Creditors Committee of Deja Vu, Inc.*, 780 F.2d 176 (1st Cir. 1986); *In Re Haugen Construction Services, Inc.*, 876 F.2d 681 (8th Cir. 1989); *In Re The Charter Company*, 876 F.2d 861 (11th Cir. 1989); *In Re Holm*, 931 F.2d 620 (9th Cir. 1991); *In Re Reliance Equity Inc.*, 966 F.2d 1338 (10th Cir. 1992); *In the Matter of Nikoloutsos*, 199 F.3d 233 (6th Cir. 2000); *In Re M. J. Waterman and Associates, Inc.*, 227 F.3d 604 (6th Cir. 2000) and, finally, *In Re Michaels*, 286 BR 684 (8th Cir., Bankruptcy Appeal Panel 2002).

The general conflict between the decision in the present case and all of the decisions cited above is this: in *absolutely none* of the cases cited above did the creditor file a document (to say nothing of multiple documents, as the Turners have in the present case) denying that the creditor had a claim. Instead, the decisions in the cases cited above turned on what type of document was filed, how clear the creditor's intention to impose liability on the bankruptcy estate was and the extent to which the creditor was able to articulate the existence and nature of its claim. The Court of Appeals' decision in the present case, though purporting to examine most of the factors that the courts in the cases cited above examined, actually turns the analysis on its head and creates the conflict described above: if a creditor is able to deny in multiple documents the notion that it has a claim, what *does* constitute,

as a matter of law, a creditor's intent to hold the bankruptcy estate liable? This is the conflict that this Court must resolve.

The Court of Appeals' decision in the present case also created a second, narrower conflict among the circuits. At pages three and four of its opinion, the Court of Appeals in the present case seems to imply that support for its ruling that the Turners' motion for relief from stay (in which they unequivocally stated more than once that they "do not have a claim") constitutes an informal proof of claim is found in the fact that both the Turners and the Browns believed that the Turners had a claim. But, we are aware of cases from at least two other circuits in which an interested party's mere knowledge of a claim cannot substitute for a creditor's obligation to articulate in a written document its intent to hold the bankruptcy estate liable.

Reported decisions that we believe conflict with the Court of Appeals' opinion in the present case in this respect are *In Re International Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985) and *In Re Reliance Equities, Inc*, 966 F.2d 1338 (10th Cir. 1992). In *International*, the Internal Revenue Service had filed proofs of claim for withholding and FUTA taxes. It did not file a proof of claim for corporate income taxes owed by the debtor, although the record had disclosed that the parties discussed that concept extensively and that the Service had issued an assessment against the debtor for back corporate income taxes. Further, the debtor had mentioned the back income taxes in its reorganization plan and provided certain contingencies for those back income taxes, including the intent to litigate that issue. Nonetheless, the Eleventh Circuit held that the Internal Revenue Service did not present a valid informal proof of claim, the Service having missed the bar date to file a claim for the back income taxes. The Eleventh Circuit held that a party's mere

knowledge of a claim is not enough to satisfy the Informal Proof of Claim Doctrine.

The Tenth Circuit reached a similar result in *In Re Reliance Industries, Inc.*, 966 F.2d 1338 (10th Cir. 1992). In that case, the creditor, otherwise failing the necessary requirements for a valid informal proof of claim, attempted to assert that the Trustee's knowledge of the claim alleviated some of the deficiencies with the creditor's documentation. The Tenth Circuit rejected that contention, holding that an interested party's mere knowledge of a claim cannot substitute for all of the requirements necessary for presentation of a valid informal proof of claim.

In the present case, to the extent that the Court of Appeals relied on the premise that the Browns knew that the Turners had a claim and that the Turners knew it (even though they made the specific, strategic choice to not articulate that fact in any court document – and indeed to actively deny the fact in court documents) as part of its rationale for allowing an informal proof of claim, the Court of Appeals' decision in the present case conflicts directly with *International* and *Reliance*.

This is not merely the incorrect application of a properly stated rule of law by the Court of Appeals in this case. It is, instead, an anomalous decision that calls into question what precisely constitutes a creditor's intent to hold a bankruptcy estate liable. In the process, the decision also creates conflict with at least two other Court of Appeals' decisions from other

circuits. We respectfully submit that this alone is sufficient grounds for this Court to grant review.[2]

The next section will address other reasons that we believe it appropriate for the Court to review the present case. These revolve around conflicts that have developed in the circuits over the years with respect to certain aspects of the Informal Proof of Claim Doctrine.

ARGUMENT II

APART FROM THE CONFLICTS AMONG THE CIRCUITS THAT THE COURT OF APPEALS' DECISION IN THE PRESENT CASE CREATED, OTHER CONFLICTS AMONG THE CIRCUITS IN THIS AREA OF LAW DO REQUIRE RESOLUTION BY THIS COURT.

The cases from other circuits that we cited in the previous section span a period of almost twenty years. All of the cases, obviously, address the requirements for a creditor to establish an informal proof of claim within the context of a bankruptcy proceeding. Yet, there are conflicts among the circuits on at least two issues within the rubric of informal proof of claim.

The first conflict manifests itself in the proper standard of review. In the present case, the Court of Appeals did not

2. In all of the lower courts, we argued that § 1111(a) of the Bankruptcy Code foreclosed the Turners from making any sort of claim after the bar date. That statute is reproduced here as an appendix, and we will not take up space in this petition to repeat its provisions here. None of the lower courts addressed that issue, but it would have to be addressed if this Court were to hold that the Turners did not perfect a valid "informal proof of claim."

articulate its standard of review, so we are not entirely sure which standard it applied. We submit that the Court of Appeals decision is incorrect regardless of which standard is used, be it plenary review or a review for abuse of discretion. But, even if this Court accepts that premise as true for the moment, that does not resolve the conflicts that exist among the circuits.

The Eleventh Circuit and the Sixth Circuit review these matters under an abuse of discretion standard. *See In Re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985). *See also In Re M. J. Waterman Associates, Inc.*, 227 F.3d 604, 607-08 (6th Cir. 2000).

Conversely, the Ninth Circuit has held that whether a document constitutes an informal proof of claim is subject to *de novo* review and is a pure question of law. *See In Re Anderson-Walker Industries, Inc.*, 798 F.2d 1285, 1287 (9th Cir. 1986). Further, the Eighth Circuit has left the question of standard of review completely open. *See In Re Michaels*, 286 BR 684, 691 (8th Cir. Bankruptcy Appellate Panel 2002). In sum, we have differing standards of review among the circuits, and we present this in a case in which the Court of Appeals involved here did not even articulate its standard of review. This is an issue that this Court could clarify for the circuits, and we submit that it would be appropriate for this Court to do so.

The circuits have also differed on the precise filing requirements for an informal proof of claim. In *In Re Haugen Construction Services, Inc.*, 876 F.2d 681 (8th Cir. 1989), the Eighth Circuit held that a creditor's correspondence with the bankruptcy trustee, correspondence not actually filed with the bankruptcy court, constituted an informal proof of claim.

The Ninth Circuit reached a similar result in *In Re Anderson-Walker Industries, Inc.*, 798 F.2d 1285 (9th Cir. 1986). Conversely, the Third Circuit Court of Appeals in the present case, along with all of the other circuits that have reported decisions on the Informal Proof of Claim Doctrine (the First, Fifth, Sixth, Tenth and Eleventh Circuits, all in the cases cited in the first section of this petition) require that the documents that a creditor seeks to have deemed an informal proof of claim must be filed with the bankruptcy court itself. Again, we submit that the present case would be an appropriate vehicle for this Court to resolve this conflict among the circuits.

In terms of the manner in which the case reaches this Court, and in terms of the context of the issue, the present case is similar to *Pioneer Investment Services, Co. v. Brunswick Associates Limited Partnership*, 503 U.S. 380, 113 S. Ct. 1389 (1993).[3] In that case, this Court took the opportunity to clarify the doctrine of "excusable neglect" as that phrase is used in deciding whether to allow a creditor to file a late proof of claim. We believe that the present case is similar to *Pioneer* in that the present case presents conflicts among the circuits with respect to proofs of claim filed in a bankruptcy proceeding, just as *Pioneer* did. As was true with *Pioneer*, case law from the circuits has accumulated over a number of years, and there are conflicts within that case law.

The same is true of the present case. With all due respect to the Third Circuit, we submit that its decision in the present

3. In the proceedings below, we addressed *Pioneer* in terms of the impact it had (we believed that it had minimal impact, given the procedural context of our particular case) on the Third Circuit's analysis of § 1111(a) of the Bankruptcy Code and certain controlling precedent within the Third Circuit.

case created a conflict with the decisional law of at least two other circuits, as noted in the first section of this petition. Even apart from the Court of Appeals' decision in the present case, though, there are other conflicts that exist among the circuits with respect to certain facets of the Informal Proof of Claim Doctrine. We addressed those in this section of the petition. Like *Pioneer*, we believe that this case presents this Court a unique opportunity not only to rectify a curious result, but also to eliminate conflicts among the circuits in at least three areas of the Informal Proof of Claim Doctrine, conflicts that have arisen over a period of nearly twenty years. We respectfully submit that the Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and resolve all of these conflicts (significance of a party's knowledge of a claim, the standard of review employed in evaluating the existence of an informal proof of claim and the place where the informal proof of claim needs to be filed) among the circuits.

CONCLUSION

For the reasons stated above, Petitioners Robert E. Brown, M.D. and Dorothy L. Brown respectfully submit that their Petition for Writ of Certiorari should be granted, the writ should issue to the United State Court of Appeals for the Third Circuit, and this Court should thereby review their case.

Respectfully submitted,

ROBERT D. KODAK
KNUPP, KODAK & IMBLUM, P.C.
Attorneys for Petitioners
407 North Front Street
P.O. Box 11848
Harrisburg, PA 17108-1848
(717) 238-7151